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No. 93-2063

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

MARISELA MAURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioner's trial on a new indictment when her first indictment was dismissed for failure to state an offense.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is unpublished, but the decision is noted at 19 F.3d 35 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1994. The petition for a writ of certiorari was filed on May 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of Florida on two counts of embezzling letters while being a Postal Service employee, in violation of 18 U.S.C. 1709. Prior to trial, she moved to dismiss the indictment, claiming that the Double Jeopardy Clause barred the prosecution. The district court denied that motion, and on interlocutory appeal the court of appeals affirmed. Pet. App. A1.

1. In 1991, petitioner was indicted in the Southern District of Florida. The indictment alleged that petitioner, "while an officer of the United States Postal Service, did knowingly and willfully steal, abstract and remove [two letters] * * * entrusted to her and which came into her possession intended to be conveyed by mail; in violation of Title 18, United States Code, Section 1709." Gov't C.A. Br. 3. Petitioner did not challenge her indictment prior to trial. In its opening statement, the government asserted that petitioner had been observed in the act of stealing two letters containing unsigned credit cards from a Postal Service sorting facility. Petitioner then moved for a judgment of acquittal. She argued that, accepting the government's characterization of the pertinent facts, the indictment did not charge a crime under *United States* v. *Trevino*, 491 F.2d 74 (5th Cir. 1974), because under Section 1709 the charged offense should have been embezzlement of mail rather than stealing mail. Gov't C.A. Br. 4-5.[1]

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[1] Section 1709 proscribes the embezzlement, by a Postal Service officer or employee, of "any letter, postal card, package, bag, or mail, or any article or thing contained therein entrusted to him or which comes into his possession intended to be conveyed by mail." 18 U.S.C. 1709. The statute also establishes criminal penalties for any person who "steals, abstracts, or removes from any such letter,

Government counsel stated that she could not respond to this argument because of the lack of notice of petitioner's claim. The district court decided to permit the government to present its evidence. At the close of the government's case, the court heard argument on petitioner's motion for a judgment of acquittal. The court denied that motion but *sua sponte* dismissed the indictment for failure to state an offense. Gov't C.A. Br. 6-8. The court stated that it was not making a ruling on the evidence. *Id.* at 8-9. In a later written order, the district court stated that it had dismissed the indictment under *Trevino*. Pet. Supp. App. A3. The court also stated that it would "not rule on the issue of double jeopardy as such a determination is premature at this time." *Id.* at A4.

2. In March 1992 petitioner was reindicted, this time for embezzling letters. Petitioner moved to dismiss the indictment on double jeopardy grounds, but the district court denied that motion. Pet. Supp. App. A1-A2. On interlocutory appeal, the court of appeals affirmed the district court's ruling. Pet. App. A1.

ARGUMENT

Petitioner contends that the Double Jeopardy Clause bars the instant prosecution. That argument is without merit. Because petitioner's first indictment was dis-

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package, bag, or mail, any article or thing contained therein." In *Trevino*, the Fifth Circuit stated that "the first offense under the statute is that of embezzlement and includes (1) letters or (2) articles contained therein. The second offense is that of stealing articles removed from any such letter as distinguished from the letter itself." 491 F.2d at 75. The court concluded that an indictment charging the defendant with stealing a letter "failed to state an offense and must be dismissed." *Id.* at 76.

missed for failure to charge an offense, she may be tried on the second indictment.

1. In *Lee* v. *United States*, 432 U.S. 23 (1977), this Court considered facts very similar to those of the instant case. *Lee* involved the theft of two billfolds from the blind concession operator in the lobby of a United States Post Office in Indiana. Lee was charged with theft, in violation of the Assimilative Crimes Statute, 18 U.S.C. 13, and the applicable Indiana statute. After the prosecutor's opening statement, Lee moved to dismiss the information on the ground that it did not allege knowledge or the intent to deprive the victim of his property, essential elements of the crime of theft under Indiana law. See 432 U.S. at 24-25.

As in the instant case, the district court in *Lee* permitted the government to present its evidence before ruling on the motion to dismiss. The court ultimately concluded that the government had presented sufficient evidence to support a conviction, but that the failure of the information to charge knowledge or intent required dismissal of the charge. Lee was subsequently retried pursuant to an information alleging all of the elements of the assimilated state crime. He was convicted, and the Seventh Circuit affirmed, rejecting his contention that the second trial was barred by the Double Jeopardy Clause. See 432 U.S. at 26-27.

This Court affirmed. It stated that "[w]here a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, * * * further prosecution is barred by the Double Jeopardy Clause." 432 U.S. at 30. The Court concluded, however, that

> the proceedings against Lee cannot be said to have terminated in his favor. The dismissal clearly was

> not predicated on any judgment that Lee could never be prosecuted for or convicted of the theft of the two wallets. To the contrary, the District Court stressed that the only obstacle to a conviction was the fact that the information had been drawn improperly. The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant. And there can be little doubt that the court granted the motion to dismiss this case in contemplation of just such a second prosecution. In short, the order entered by the District Court was functionally indistinguishable from a declaration of mistrial.

Id. at 30-31. Subsequent decisions by the courts of appeals have recognized that the Double Jeopardy Clause does not bar reprosecution following the discovery of a defect in the first charging instrument. See, *e.g.*, *United States* v. *Boyd*, 566 F.2d 929, 932 n.5 (5th Cir. 1978) (citing *Lee*); *United States ex rel. Young* v. *Lane*, 768 F.2d 834, 839 (7th Cir.) ("If the prosecution makes a mistake in drafting the indictment, and this causes a mid-trial dismissal, that may be corrected and the trial redone.") (citing *Lee*), cert. denied, 474 U.S. 951 (1985).

2. Petitioner relies upon this Court's decision in *Finch* v. *United States*, 433 U.S. 676 (1977), issued 16 days after the ruling in *Lee*. In *Finch*, the defendant was charged by information with going upon Indian trust land for the purpose of fishing, in violation of 18 U.S.C. 1165. See *United States* v. *Finch*, 395 F. Supp. 205, 207 (D. Mont. 1975), rev'd, 548 F.2d 822 (9th Cir. 1976), vacated, 433 U.S. 676 (1977). The district court presided over a nonjury trial, and the case was submitted to the court on an agreed statement of facts. The court

examined the language of treaties between the United States and various Indian Nations to determine whether the defendant had committed a violation of applicable law. The court determined that the land in question was not in fact Indian trust land, and concluded on that basis that "the information on file herein does not state an offense against the United States." 395 F. Supp. at 213.

The government appealed. The court of appeals rejected Finch's claim that the Double Jeopardy Clause barred the appeal, holding that because no additional findings of fact would be necessary in the district court, a different ruling on the law would not violate the defendant's double jeopardy rights. *United States* v. *Finch*, 548 F.2d 822, 824-827 (9th Cir. 1976), vacated, 433 U.S. 676 (1977). After a lengthy discussion of the pertinent treaties, 548 F.2d at 827-834, the court held that the land in question was Indian trust land and that Finch had violated 18 U.S.C. 1165. 548 F.2d at 835.

This Court reversed, holding that the government's appeal from the dismissal of the indictment was barred by the Double Jeopardy Clause. Relying in part on *United States* v. *Jenkins*, 420 U.S. 358 (1975), the Court observed that the effect of the court of appeals' remand was to require additional proceedings in the district court. 433 U.S. at 677. The Court concluded that

> [b]ecause the dismissal was granted prior to any declaration of guilt or innocence, "on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged," *Lee*, [432 U.S.] at 30, we hold that the Government's appeal was barred by the Double Jeopardy Clause.

Ibid.

The instant case is plainly controlled by *Lee* rather than by *Finch*. In dismissing the indictment, the

district court here did not question the government's contention that the conduct in which petitioner was alleged to have engaged constituted a violation of 18 U.S.C. 1709. Nor did the court question the sufficiency of the evidence presented in support of the government's charges. Rather, the court's decision was based on a technical defect in the drafting of the indictment, a defect unrelated to the merits of the government's legal theory or the adequacy of its proof.

There is consequently no merit to petitioner's claim (Pet. 27) that dismissal of the first indictment constituted an "acquittal" of the underlying charges. Nor is the dismissal accurately characterized as resting on a determination that petitioner "could not be found to have stolen, abstracted or removed the letters as a matter of law under *United States v. Trevino*." *Ibid.* As *Trevino* makes clear, the defect in the initial indictment was that 18 U.S.C. 1709 does not prohibit stealing letters—not that the evidence showed petitioner to be innocent of such a charge. See 491 F.2d at 76 ("Appellant was charged with stealing a letter and the statute does not embrace such a charge."). The situation is thus closely akin to that in *Lee*, where the allegations in the charging instrument (which included no allegation of knowledge or intent) did not state a violation of Indiana law, but where the evidence presented at trial (if credited by the finder of fact) was clearly sufficient to support a conviction. The courts of appeals have recognized the distinction between the technical drafting defect involved in *Lee* and the failure of proof involved in *Finch*. See, *e.g.*, *United States* v. *Boyd*, 566 F.2d at 932 n.5 (noting that "in *Lee* the district court dismissed the information after both sides rested because the information failed to charge either knowledge or intent as required by Indiana law, and not because the

government failed to prove such knowledge or intent"); *United States* v. *Allied Towing Corp.*, 602 F.2d 612, 616 (4th Cir. 1979) (emphasizing that the district court in *Finch* "addressed factual elements of the crime charged and * * * the dismissal resolved questions determinative of guilt in favor of the defendant"); *United States* v. *Wagstaff*, 572 F.2d 270, 272 (10th Cir. 1978) (discussing *Lee* and *Finch*, and noting the distinction between "a lack of proper pleading" and "a defect in the case, whereby the accused can never be convicted").[2]

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[2] The Court in *Finch* placed substantial reliance on *United States* v. *Jenkins*, 420 U.S. 358 (1975). In *Jenkins* the Court held that the Double Jeopardy Clause prevents the government from appealing *any* midtrial termination if "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." *Id.* at 370. *Jenkins* was later overruled in *United States* v. *Scott*, 437 U.S. 82, 101 (1978), which held that a district court's midtrial dismissal of an indictment based on pre-indictment delay was subject to appeal by the government. The Court explained that when a defendant obtains termination of his trial on a ground unrelated to factual guilt or innocence, the Double Jeopardy Clause does not bar an appeal by the government, even where a successful appeal would necessitate a second trial. *Id.* at 96. Although the government may not appeal an "acquittal," the Court emphasized, "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *Id.* at 97 (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)).

One court of appeals, noting that this Court has not subsequently relied upon *Finch*, has expressed the view that "*Scott* overruled *Finch* along with *Jenkins*." *United States ex rel. Young* v. *Lane*, 768 F.2d 834, 838-839 (7th Cir.), cert. denied, 474 U.S. 951 (1985). Some aspects of the Court's opinion in *Scott*—particularly its assertion that "an appeal is not barred simply because a ruling in

3. Nor is there merit to petitioner's contention (Pet. 26-27) that the second prosecution was barred because she requested a judgment of acquittal rather than dismissal of the initial indictment.[3] In *Illinois* v. *Somerville*, 410 U.S. 458 (1973), a state prosecutor in drafting an indictment made the same error as was made in *Lee*, omitting any allegation of intent to deprive the victim of his property. See 410 U.S. at 459. The trial court declared a mistrial *over the defendant's objection*

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favor of a defendant * * * is granted on the ground that the defendant simply cannot be convicted of the offense charged," 437 U.S. at 96-97 (ellipsis and internal quotation marks omitted)—indeed cast doubt upon the continuing vitality of *Finch*. As we explain in the text, however, dismissal of the initial indictment in the instant case would not bar a subsequent prosecution even under the approach taken in *Finch*.

[3] In determining whether the Double Jeopardy Clause bars reprosecution after a mistrial, this Court has distinguished between cases in which "the trial is terminated over the objection of the defendant" and those involving "a mistrial declared at the behest of the defendant." *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982). In the former context, a second prosecution is barred unless there was a "manifest necessity" for the mistrial, *ibid.*; but in the latter setting a second prosecution can go forward unless "the prosecutor's actions giving rise to the motion for mistrial were done in order to goad the defendant into requesting a mistrial." *Id.* at 673 (brackets and internal quotation marks omitted).

It is far from clear that the present case is accurately characterized as one in which "the trial [was] terminated over the objection of the defendant." 456 U.S. at 672. Petitioner argued to the district court that the indictment failed to state an offense, and she based her argument on *Trevino*, although the relief she sought was a judgment of acquittal rather than dismissal of the indictment. As we explain in the text, however, dismissal of the indictment in this case satisfied even the "manifest necessity" standard applicable where a trial is terminated over the defendant's objection.

after jeopardy had attached. *Id.* at 459-460. The Court held that the Double Jeopardy Clause did not bar a second prosecution, *id.* at 461-471, because the grant of a mistrial was justified under the standard of "manifest necessity" announced in prior decisions. *Id.* at 469.[4] Similarly here, petitioner's failure to request dismissal of the indictment does not alter the effect of the district court's ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] As the Court subsequently noted in *Lee*, "[t]here is no reason to believe that *Somerville* would have been analyzed differently if the trial judge, like the District Court here, had labeled his action a 'dismissal' rather than a mistrial." 432 U.S. at 31 n.9.